Supreme Court, U.S.
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70 - 326

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1971

No. [redacted]

WILLIAM EARL JOHNSTON, Petitioner

vs.

UNITED STATES OF AMERICA, Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

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June 17, 1971

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1971

No._____

WILLIAM EARL JOHNSTON, Petitioner

vs.

UNITED STATES OF AMERICA, Respondent.

Petitioner prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in the above case on April 13, 1971.

OPINIONS BELOW

The opinion of the United States District Court for the Southern District of California finding the petitioner guilty on both counts of the indictment is unreported and is printed in Appendix B hereto. The opinion of the United States Court of Appeals, Ninth Circuit, which affirmed the judgment of the District Court for the Southern District of California is unreported and is printed in Appendix A hereto. Petition for rehearing was denied by the Circuit Court.

JURISDICTION

The judgments of the Court of appeals for the Ninth Circuit were made and entered on April 13, 1971, and copies thereof are appended to this petition in Appendix A. The Petition for Rehearing was denied May 23, 1971. The jurisdiction of this Court

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is invoked under 28 U.S.C. 1254 (1).

QUESTION PRESENTED

1. Petitioner was charged with smuggling marijuana and convicted on circumstantial evidence. Though there was evidence tending to indicate that petitioner knew he was smuggling, but did not know what, a lesser included offense instruction on smuggling within the charge of smuggling marijuana was refused.

When evidence warrants an inference by the jury that the defendant did not know the nature of contraband being smuggled, does Rule 31 (c) Federal Rules of Criminal Procedure require an instruction that Title 18 United States Code, Section 545 is a lesser included offense under Title 21, United States Code, Section 176 (a).

STATUTORY PROVISIONS INVOLVED

United States Code, Title 18 §545 Smuggling Goods into the United States.

Whoever knowingly and willfully, with intent to defraud the United States, smuggles, or clandestinely introduces into the United States any merchandise which should have been invoiced, or makes out or passes, or attempts to pass, through the customhouse any false, forged, or fraudulent invoice, or other document or paper; or

Whoever fraudulently or knowingly imports or brings into the United States, any merchandise contrary to law, or receives,

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conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of such merchandise after importation, knowing the same to have been imported or brought into the United States contrary to law.

Shall be fined not more than $10,000 or imprisoned not more than five years, or both.

Proof of defendants' possession of such goods, unless explained to the satisfaction of the jury, shall be deemed evidence sufficient to authorize conviction for violation of this section.

Merchandise introduced into the United States in violation of this section, or the value thereof, to be recovered from any person described in the first or second paragraph of this section, shall be forfeited to the United States.

The term "United States," as used in this section, shall not include the Philippine Islands, Virgin Islands, American Samoa, Wake Island, Midway Islands, Kingman Reef, Johnston Island, or Guam.

United States Code, Title 21 §176(a) Smuggling of marijuana. (Repealed, Pub. L. 91-513, Title III, §110 (a) (2), Oct. 27, 1970, 84 Stat. 1291).

Notwithstanding any other provision of law, whoever, knowingly, with intent to defraud the United States, imports or brings into the United States marijuana contrary to law, or smuggles or clandestinely introduces into the United States marijuana which should have been invoiced, or receives, conceals,

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buys, sells, or in any manner facilitates the transportation, concealment, or sale of such marijuana after being imported or brought in, knowing the same to have been imported or brought into the United States contrary to laws, or whoever conspires to do any of the foregoing acts, shall be imprisoned not less than five or more than twenty years and, in addition, may be fined not more than $20,000. For a second or subsequent offense (as determined under section 7237 (c) of the Internal Revenue Code of 1954,) the offender shall be imprisoned for not less than ten or more than forty years and, in addition, may be fined not more than $20,000.

Whenever on trial for a violation of this subsection, the defendant is shown to have or to have had the marijuana in his possession, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains his possession to the satisfaction of the jury.

As used in this section, the term "marijuana" has the meaning given to such term by section 4761 of the Internal Revenue Code of 1954.

For provisions relating to sentencing, probation, etc., see section 7237 (d) of the Internal Revenue Code of 1954. Feb. 9, 1909, C.100.

FEDERAL RULES CRIMINAL PROCEDURE, RULE 31 (c)

Conviction of Less Offense. The defendant may be found guilty of an offense necessarily included in the offense charged or of an attempt to commit either the offense charged or an

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offense necessarily included therein if the attempt is an offense.

STATEMENT OF THE CASE

The basic facts, which are not in dispute, are as follows:

Petitioner WILLIAM EARL JOHNSTON, was indicted by a Grand Jury in the Southern District of California in Criminal Cause No. 8017 on February 3, 1970. The indictment contained two counts, both of which he was held to answer. Count I charged:

> On or about January 27, 1970, in Imperial County, within the Southern District of California, defendant, WILLIAM EARL JOHNSTON with intent to defraud the United States, knowingly smuggled and clandestinely introduced into the United States from Mexico, approximately 176 pounds of marijuana should have been declared; and knowingly imported and brought into the United States from Mexico said marijuana contrary to law, in that said marijuana had not been presented for inspection, entered and declared as provided by United States Code, Title 19, Sections 1459 and 1461.

Count II charged:

> On or about January 27, 1970, in Imperial County,

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within the Southern District of California, defendant, WILLIAM EARL JOHNSTON with intent to defraud the United States, knowingly concealed, and facilitated the transportation and concealment of approximately 176 pounds of Marijuana, which marijuana, as the defendant then and there well knew, had been imported and brought into the United States contrary to law.

Trial was had in the United States District Court for the Southern District of California at San Diego before the Honorable C. A. MUECKE. After two days of trial, on July 23, and 24, 1970, the jury returned a guilty verdict on both counts of the indictment (trial transcript p. 102). On September 11, 1970, WILLIAM EARL JOHNSTON, the petitioner was sentenced to 5 years imprisonment on Counts I and II, with the sentences to run concurrently. On September 15, 1970, Notice of Appeal was timely filed by the petitioner.

At the trial WILLIAM EARL JOHNSTON (hereinafter referred to as petitioner) moved for acquittal noting that there "might be a sufficient amount of evidence to convict him of a lesser charge of smuggling merchandise, but an insufficient amount of evidence to convict him of the charge of smuggling marijuana." (Trial transcript, pp. 33 and 34). This motion was based on the element of knowledge which is required for the petitioner to have known that the merchandise was in fact marijuana. (Trial transcript p. 34.) The Court denied the motion based on the fact that it felt

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that an inference could be made from a note found in the trailer in a coat of the petitioner. (Trial transcript, pp. 34 and 35.) Later in the trial the petitioner and the Court discussed petitioner's requested instruction which pertained to a lesser included offense. (Trial transcript, p. 61) that such an instruction would be considered if the "evidence would have left some doubt as to his. . .or that he had knowledge that something was there but didn't know it was marijuana." As the Court later notes, "It's a rather novel question . . . ." (Trial transcript, p. 62.) The lesser included offense instructions were not given to the jury (Trial transcript, p. 62), and the petitioner was convicted as charged.

Petitioner appealed to the United States Court of Appeals, Ninth Circuit, alleging that it was reversible error for the District Court to refuse to instruct that Title 18, United States Code, Section 545 is a lesser included offense under Title 21, United States Code, Section 176 (a) on the facts of his case. In support of his allegation, petitioner cited Circuit Court and United States Supreme Court decisions, all of them indicating that reversible error had been made in the District Court.

On April 13, 1971 the Circuit Court affirmed the holding in the District Court. United States of America vs. William Earl Johnston, No. 71-1347. In its Per Curiam decision, the Circuit Court stated in pertinent parts:

> "In another case, the contention might be correct. But here it was marijuana that was

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smuggled or nothing. Defendant could not be guilty of 18 U.S.C. §545 without having violated 21 U.S.C. 176 (a).

See OLAIS-CASTRO vs. UNITED STATES, 9 Cir., 416 F.2d. 1155."

Petition for Rehearing was timely filed, and denied on May 25, 1971.

REASONS FOR GRANTING THE WRIT

1. The decision below conflicts with the decision of this Court in SANSOME vs. UNITED STATES, 380 U.S. 343, 85 Sct. 1004; 13 L. Ed 2d. 882 (1965).

A unique and confusing problem is presented by the Ninth Circuits affirmation of petitioner's conviction, wherein it held that it was no error not to instruct about a lessor offense. Broken down into chronological pattern, the Ninth Circuit initially departed from SANSOME vs. UNITED STATES, in OLAIS-CASTRO vs. UNITED STATES and now has returned to SANSOME, supra, but in so doing misapplied the SANSOME elements to petitioner's case.

This Court in SANSOME vs. UNITED STATES, supra, discussed the requisite elements for a proper instruction on a lesser included offense. This Court stated:

> "'The basic principles controlling whether or not a lesser included offense charge should be given in a particular case have been settled by this Court. Rule 31 (c) of the Federal Rules

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of Criminal Procedure provides in relevant part, that the 'defendant may be found guilty of an offense necessarily included in the offense charged.' Thus, ' in a case where some of the elements of the crime charged themselves constitute a lesser crime, the defendant, if the evidence justifie(s) it . . . (is) entitled to an instruction which would permit a finding of guilt of the lesser offense.' . . . But a lesser offense charge is not proper where, on the evidence presented, the factual issues to be resolved by the jury are the same as to both the lesser and greater offenses. . . . In other words, the lesser offense must be included within but not, on the facts of the case, be completely encompassed by the greater. A lesser included offense instruction is only proper where the charged greater offense requires the jury to find a disputed factual element which is not required for a conviction of the lesser included offense." 380 U.S. 343, 349; 85 S. Ct. 1004, 1009; 13 L Ed 2d. 882, 887-888.

The SANSOME case, involved the question of whether Rule 31 (c) F.R.C.P. applies to the respective tax statutes involved. This Court in applying its own formula decided that the greater and lesser offenses involved here, "covered precisely the same ground,"

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and thus petitioner was not entitled to a lesser-included offense charge. This Court evidenced its concern that the greater and lesser offenses should not cover the same elements. This of course is entirely commensurate with this Court's earlier statement that one offense cannot completely encompass the other.

The Ninth Circuit has departed from the standards established by this Court. Citing OCAMPO-CASTRO vs. UNITED STATES, 9 Cir., 416 F.2d. 1155. (1969) The Circuit Court summarily reaffirmed the District Court's denial of the lesser-included offense instruction.

Analysis of the OCAMPO-CASTRO case, supra, quickly reveals the error inherent in its usage. Although paying lip service to SANSONE, supra, the Ninth Circuit has engrafted its own restrictive definition of a lesser offense.

> "To be necessarily included in the greater offense, the lesser must be such that it is impossible to commit the greater without first having committed the lesser . . . stated differently, the offense must not require some additional element not needed to constitute the greater offense." (416 F.2d. 1155, 1157.)

This erroneous definition flies in the face of SANSONE, supra, wherein this Court specifically stated that the two offences cannot cover the same ground; be completely encompassed by the other.

Further support for this conclusion is found in the

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Ninth Circuit's treatment of the standard involved in GILES-CASTRO. GILES-CASTRO was convicted on a charge of importing and bringing two ounces of heroin into the United States from Mexico contrary to 21 U.S.C. §174. (1964). He appealed his conviction claiming error by the trial court in its refusal to give an instruction on the lesser offense 18 U.S.C. §545 (1964).

Analyzing the elements of each respective statute, the Ninth Circuit held that as 18 U.S.C. §545 (1964) required somewhat different elements than the section 174 crime required, it could not be regarded as a lesser-included offense. This conclusion follows the Circuit Court's statement that the lesser offense cannot require some additional element not needed to constitute the greater offense.

In effect then, the Circuit Court by demanding similar elements in both the lesser and greater crimes directly contradicts the SANSONE rational, which prohibits the greater from totally encompassing the lesser crime.

The Ninth Circuit's treatment of this area returned to the commands of SANSONE, as witnessed by the decision in petitioner's case. The Circuit Court recognized the prohibition in SANSONE against the total encompassment.

> "In another case, the contention might be correct. But here it was marijuana that was smuggled or nothing. Defendant could not be guilty of 18 U.S.C. §545 without having violated 21 U.S.C. 176 (a)." U.S. vs. [illegible]

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The Circuit Court apparently concluded that 18 U.S.C. §545 was totally encompassed by 21 U.S.C. 176(a) and, therefore, complying with SIMSCOE, supra, a lesser offense instruction would not be proper.

The logic of the Circuit Court is correct but the application of the logic to the facts is erroneous. 18 U.S.C. §545 is not totally encompassed by 21 U.S.C. 176(a). Analysis of the elements required under each illustrates that the SIMSCOE criteria is present and a lesser offense instruction would be proper.

The essential elements of the 176(a) crime are:

(1) Defendant knowingly, (2) with intent to defraud the United States, (3) imports or brings into the United States marijuana contrary to law, (4) or smuggles or clandestinely introduces into the United States marijuana which should have been invoiced. The essential elements of the 545 offense, as delineated in the first paragraph of that section are: (1) Whoever knowingly, (2) and willfully, (3) with intent to defraud the United States, (4) smuggles or clandestinely introduces into the United States, (5) any merchandise, (6) which should have been invoiced.

The distinction between these two sections is clear. Section 545 is a lesser offense within the greater offense section 176(a). Both sections contain the elements of knowledge, intent to defraud and clandestine introduction of an item which should have been invoiced. Some of the elements of the indicted offense, themselves constitute the lesser crime. There is also a factual

required knowledge rule, duty to claim that all such privileges was in fact mandatory, an element not required for a conviction of the lesser offense.

It is true that section 545 has an element of willfulness. This element, however, should not have any adverse effect, for it is questionable whether knowledgeable action and lawful action are distinct. This court in SANSONE, cited to that anachronous nature, when it referred to Sansone's failure to report the contract income on his tandem tax returns:

"(P)etitioner's act was willful in the sense that he knew that he should have reported more income . . . (360 U.S. 345,

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for various offenses collected under federal statutes. To allow the Ninth Circuit to continue in its current misconceptions and misapplications of the lesser offense instruction will lead to false effects on the criminal justice model of the Ninth Circuit. Its unique geographical position places its jurisdiction within borders which front the Country of Mexico and approximately three thousand miles of Pacific Ocean. Certainly there will be future escalating in narcotics over these two major borders. The confusion created in the Ninth Circuit unless resolved will prevail and develop in future prosecutions and appeals.

E. The decision of the Court below is in conflict

with the decisions of other Courts of Appeals as to the proper interpretation of rule 31 (c) of the Federal Rules of Criminal Procedure.

The Court below by denying Petitioner's request for an instruction on the lesser offense followed the restrictive and isolated holding in OCAMPO-CASTRO vs. UNITED STATES, supra. The use of this single precedent, which is itself a product of the Ninth Circuit, illustrates the continuing adherence to a judicial view which is contrary to that expressed by the Court of Appeals for the District of Columbia and the Third Circuit.

In its substance, the conflict between the Ninth and other circuits is reduced to two distinct outlooks on the lesser offense instruction. The Ninth Circuit takes a restrictive view which the other circuits, particularly the District of Columbia Circuit, express a policy of allowing the lesser instruction

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whenever possible. This growing disparity between the Ninth Circuit and its sister circuits provides the fuel for an ever increasing conflict with continuing future consequences. Such conflict can only be resolved by prompt action by this Court.

The prevailing view in this area was expressed recently in the case of GOVERNMENT OF THE VIRGIN ISLANDS vs. CARMONA, 422 F.2d. 95, (3rd Cir., 1970). The Circuit Court deciding on Carmona's contention that he was entitled to an instruction on the lesser crimes of second degree murder and manslaughter invoked Rule 31 (c). The Circuit Court referred to the rule in this manner:

> "Although the language of the Rule is permissive it appears settled that a 'lesser-included offense' charge is a matter of right if the conditions set forth in the Rule are satisfied . . . . These conditions as judicially expounded are twofold. First, the lesser included offense must be comprised solely of some but not all of the elements of the offense charged. Second, there must be a genuine conflict of evidence as to an element of the offense charged, which is not shared by the lesser included offense." GOVERNMENT OF THE VIRGIN ISLANDS vs. CARMONA, 422 F.2d, 95, 100 (3rd Cir., 1970).

The Court held that the trial judge erred in not granting the requested charge on the lesser offense, and such was reversible

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error.

The Third Circuit expresses the importance of Rule 31(c) by deeming it settled that the charge is a matter of right when the proper conditions are met. The crucial point of consideration, therefore, becomes the conditions which when met give rise to the right confirmed in VIRGIN ISLANDS, supra.

In petitioner's case the crucial condition required for the lesser offense charge is the genuine conflict of evidence as to an element of the offense charged, which element is not shared by the lesser included offense. This element is the knowledge that the smuggled item is in fact marijuana, for under 18 U.S.C. 176 (a) such knowledge must be present; while under 21 U.S.C. 545 only knowledge that merchandise is smuggled is required. Petitioner, however, was refused the chance to develop a defense based on the conflict of these two elements by the District Court. At page 61 of the transcript of jury trial, the District Court stated:

> "There is no question about knowledge."

Then at page 63 of the transcript:

> "He (petitioner) either did or didn't know . . . . I can't possibly understand what he believed he was smuggling in, except marijuana, and in this day and age. . . or that it could be green tea or something like that . . . . I find it incredible."

The Ninth Circuit affirmed this rational as indicated by its statement:

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"But here it was marijuana that was smuggled or nothing". UNITED STATES vs. JOHNSTON.

A startling contrast between this restrictive view expressed in the Ninth Circuit and the policy enunciated by the District of Columbia Circuit is seen in BELTON vs. UNITED STATES, 382 F. 2d. 150, (D.C. Cir. 1967). Discussing the denial of a manslaughter instruction as a lesser offense of first and second degree murder, the Circuit Court stated:

> ". . . (A)n accused is entitled to an instruction on (the lesser offense) if there is 'any evidence fairly tending to bear upon the issue of the (lesser offense), however weak, and the Court may not intrude on the province of the jury which may find credibility in testimony that the judge may consider overborne by the simply overwhelming evidence of the prosecutor.'". (382 F. 2d. 150, 155).

The policy gleaned from BELTON, supra, is in direct conflict with the decision of the Ninth Circuit in endorsing the District Court's intrusion into the province of the jury. BELTON indicates that the lesser offence instruction is to be encouraged with "any evidence fairly tending to bear on the issue . . . ." The lesser offense is not to be summarily denied by the Court which considers the "simply overwhelming" evidence of the state.

The latitude encouraged by the District of Columbia

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Circuit is enhanced by WOMACK vs. UNITED STATES, 336 F.2d. 959 (D.C. Cir. 1964).

> ". . . (A) defendant is entitled to an instruction on any issue fairly raised by the evidence, whether or not consistent with the defendant's testimony or the defense trial theory." (336 F.2d. 959.)

A brief analysis of the evidence quickly supplies the inferences about which BELTON, supra, spoke. DANIEL G. WILSON, witness for the defense, and an employee of the U.S. Treasury Department, Bureau of Customs, testified that the defendant's companion on his trip to Mexico was being investigated with respect to "this and other smuggling venture(s) he may have been involved in." (Trial transcript, p. 38). Mr. CLEMENT, the prosecution's witness, and the Customs Agency Criminal inspector in this matter, testified that there was found identification for another individual in the camper. (Trial transcript, p.28). In other testimony we find that the packages were all sealed, none were broken, (Trial Transcript, p. 26). No fingerprints were taken (Trial Transcript, p.28) and the trailer, which had been left in San Luis while petitioner stayed in Yuma, had been moved during defendant's absence. (Trial Transcript, p. 53). The prosecution at page 56 of the Trial Transcript asked petitioner when he first knew there was marijuana in the camper, and the answer was at the border, "When they found it." The prosecution then went on for several pages of testimony concerning the

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compartment where the marijuana had been concealed. (Trial Transcript pp. 56-59). The above testimony would allow a reasonable man to conclude that defendant knew he was smuggling, but was not aware of the nature of the contraband. We have no way of knowing whether thejury believed this or not, since the lesser included offense instruction was denied. Petitioner was, therefore, not allowed the benefit of inferences, however weak, upon which the jury could draw a conclusion that a lesser offense was proper, BELTON, supra.

Thus, the conflict is apparent. The District of Columbia Circuit is willing to amplify the substance of Rule 31(c) and, therefore, facilitate what the Third Circuit in VIRGIN ISLANDS vs. CARMONA, supra, held to be a matter of right. The amplification of Rule 31 (c) is seen in the District of Columbia Circuit allowing the jury to draw what it will from all the inferences of the evidence; and forbidding the court from intruding into the jury's province.

The Ninth Circuit, however, has ignored this policy of Rule 31(c) and the District of Columbia Circuit. Refusing the course which amplifies the lesser offense charge, the Ninth Circuit has critically limited what has become an appropriate defense tactic. The Ninth Circuit itself recognizes that Rule 31 (c) is available to the defense while its original purpose was to aid the prosecution. (Footnote 2, 416 F.2d. 1155, 1157).

Rule 31 (c), therefore, has become an important defense

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tool since it provides the jury with an alternative which may permit modification of punishment for the greater offense. (3 Moore's Federal Practice - Cipes, Criminal Rules, §31.05). As a federal procedural rule, its national importance is clear. Any disparate application or conception of its true nature must be rectified by this Court.

CONCLUSION

For these reasons, a Writ of Certiorari should issue to review the judgment and opinion of the Ninth Circuit.

Respectfully submitted,

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Counsel for Petitioner

and

GEORGE P. ESHOO
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Attorney for Petitioner

DATED: June 16, 1971.

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APPENDIX A

Here is set forth successively the opinion of the United States Court of Appeals, Ninth Circuit, and the denial of the Petition for Rehearing by the Court of Appeals.

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff and Appellee vs. WILLIAM EARL JOHNSTON, Appellant.	)	No. 71-1347

(April 13, 1971)

On Appeal from the United States District Court for the Southern District of California

Before: CHAMBERS, HUFSTEDLER and WRIGHT, Circuit Judges.

PER CURIAM:

The judgment of conviction is affirmed.

This was a conviction for smuggling and transporting marijuana (21 U.S.C. §176 (a)). Johnston was caught at the Mexican border.

Here he contends he was entitled to an instruction on "lesser included offense," to-wit: 18 U.S.C. §545: smuggling merchandise (without invoicing) into the United States with intent to defraud.

In another case, the contention might be correct. But here it

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was marijuana that was smuggled or nothing. Defendant could not be guilty of 18 U.S.C. $545 without having violated 21 U.S.C. See OLAIS-CASTRO v. UNITED STATES, 9 Cir., 416 F.2d 1155.

The mandate will issue forthwith.

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff and Appellee, vs. WILLIAM EARL JOHNSTON, Appellant.	)	No. 71-1347

Before: CHAMBERS, HUFSTEDLER and WRIGHT, Circuit Judges.

The petition for rehearing is denied.

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APPENDIX B

Here is set forth the decision of the District Court for the Southern District of California.

UNITED STATES DISTRICT COURT
FOR THE
SOUTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, vs. WILLIAM EARL JOHNSTON.	No. 8017 Cr.

On this 11th day of September, 1970 came the attorney for the government and the defendant appeared in person and by counsel.

IT IS ADJUDGED that the defendant upon his plea of not guilty and a verdict of guilty has been convicted of the offense of violating Title 21, Section 176a, United States Code, (smuggling and transporting marijuana) as charged in Counts One and Two of the Indictment.

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DECLARATION OF SERVICE BY MAIL

STATE OF CALIFORNIA)
) ss. Redwood City
COUNTY OF SAN MATEO)

GEORGE P. ESHOO, declares under penalty of perjury:

That he is a citizen of the United States, over 18 years of age and not a party to the within action, employed in the County of San Mateo; my business address is 617 Hamilton Street, Redwood City, California. That I served a copy of the attached APPEAL FOR WRIT OF CERTIORARI on the following:

Mr. Howard B. Frank
Assistant U. S. Attorney
325 West F Street
San Diego, California

Honorable C. A. Muecke, Judge
United States District Court
United States District Courthouse
San Diego, California

Clerk of the District Court
The United States District Courthouse
San Diego, California

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SUPREME COURT, U. S.
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No. 70-326

In the Supreme Court of the United States

OCTOBER TERM, 1971

WILLIAM EARL JOHNSTON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ERWIN N. GRISWOLD,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

After a jury trial in the United States District Court for the Southern District of California, petitioner was convicted of smuggling marihuana and concealing unlawfully imported marihuana, in violation of 21 U.S.C. 176a. He was sentenced to concurrent mandatory minimum prison terms of five years. The court of appeals affirmed *per curiam* (Pet. App. A).

The evidence showed that on January 27, 1970, petitioner entered the United States from Mexico at Andrade, California in a pickup camper. The customs inspector asked petitioner to drive to the secondary inspection area where the agent examined the camper

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He noticed that there was a hidden compartment in the camper covered over with a screwed-on board. The inspector unscrewed the board and observed several plastic, rectangular packages wrapped in tan paper in the manner customarily used to package marihuana. The inspector placed petitioner under arrest. A subsequent search of the camper disclosed that there were eighty kilo packages containing marihuana (Tr. 5–11, 20–23).[1] In addition a note was found in a sports jacket belonging to petitioner in the camper. The note contained the words "plastic", "screwdriver", and "tighten", and the last line said "plastic bag for pot" (Tr. 23–24; see Tr. 70).

Petitioner testified that he did not know marihuana was in the camper until the inspector discovered it. He testified that he had traveled with a man named Butler to Mexico; that at one point he had gone to Yuma by himself for two days and had left the camper with Butler; and that when petitioner returned, Butler was gone so petitioner returned to the United States alone. Petitioner admitted that the camper was his and that he knew of the hidden compartment (Tr. 43, 56–58).

At the close of the evidence, petitioner's counsel requested an instruction as to a lesser included offense of smuggling "merchandise" into the United States under 18 U.S.C. 545. The trial judge ruled that he would not give the instruction since in his view the evidence established no reasonable basis on which the jury could find that petitioner knew there was mer-

[1] "Tr." refers to the transcript of proceedings at trial, a copy of which we are lodging with the Clerk.

chandise in the hidden compartment of the camper, but did not know it was marihuana (Tr. 61–64). The court of appeals held that the trial judge acted properly since, in its view, the offense of smuggling merchandise is not a lesser included offense to the charge of smuggling marihuana under 21 U.S.C. 176a (Pet. App. A).

The trial court's refusal to give the requested instruction was clearly correct. As the trial judge stated, the case resolved itself into whether petitioner knew he had marihuana in the camper or not. He denied having knowledge that there was *anything* being smuggled. On the other hand, his ownership of the camper, knowledge of the compartment, and the note in his jacket pocket all pointed to his guilt, as the jury concluded. In these circumstances, no lesser included offense instruction was appropriate even assuming that 18 U.S.C. 545 qualified as a lesser included offense within the teaching of *Sansone* v. *United States*, 380 U.S. 343.

Moreover, as the court of appeals indicated (see also *Olais-Castro* v. *United States*, 416 F. 2d 1155 (C.A. 9)), it is highly doubtful if a defendant charged under Section 176a could ever properly be entitled to the lesser included offense charge requested by petitioner. Congress, by the language of Section 176a, may well have intended to make that section, with its mandatory minimum sentence, exclusive with respect to smuggled marihuana.[2] Petitioner's claim would be

[2] Section 176a was repealed by the Comprehensive Drug Abuse Prevention and Control Act of 1970, 84 Stat. 1236, 1291, so the issue raised here is of no significance for the future.

plausible at all only in the context of a person who knew he was smuggling goods that needed to be invoiced but did not know that what he was smuggling was marihuana, and there was no evidence in this case that might have led a jury to make that finding.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

AUGUST 1971.

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